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FOREWORD

WHITHER CIVIC VIRTUE?

WALTER F. PRATT, JR.*

This issue is the White Center's contribution to the bicentennial of the United States Constitution. Reflecting its purpose, the Center invited contributors to explore the normative bases for the American constitutional structure. A particular question was whether, for any generation of Americans, a consensus on normative matters is essential for the success and legitimacy of constitutional government. In response, the authors of the papers published here reflected the pragmatic concerns of the drafters of the Constitution when they took the invitation as asking, in the words of Professor Berns, "Will [this Constitution] *work* regardless of the sort of people we are or become?"¹ With a shared inter-generational perspective, the authors looked across the history of our nation to find in the past, and particularly in the founding generation, instruction for the United States in 1989. There should be no surprise in their lack of agreement on the lessons to be learned from the past—the White Center, after all, strove to present diverse views. There may, however, be surprise in the almost uniform agreement that the government or at least the citizenry of the United States today lacks the virtue once thought essential for the Constitution to endure. Thus the occasion of observing the continuity of the Constitution is, paradoxically, also the occasion for marking its decline.

The contributors approached their subjects with a common view that the American polity is losing its fight with what Senator Stevenson styles the "different spirits" that are relent-

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1. Berns, *To Secure These (Unalienable) Rights*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 23, 32 (1989) (emphasis added).

lessly in contention "for America's soul."² Even though Pastor Neuhaus admonishes that we can despair only on Tuesdays and Thursdays,³ these authors are almost uniformly melancholy about the present at least as compared with the era of the founding. With varying emphasis, they decry the absence from our public debate of a consensus even about the importance of morals, much less about morals themselves. Stevenson sees the nation as being in a "mid-life crisis."⁴ Neuhaus reports that we have descended to a point where the "ought" has been dismissed from our public debate.⁵ He warns, most strikingly, that "[i]n the guise of technological breakthrough, but actually representing cultural and moral breakdowns, we are witnessing a return of eugenics."⁶ Berns finds that the past forty years have witnessed institutional failures so that "[w]e have become a society ridden with judicially created rights."⁷ The McDonalds are the most pessimistic of all. They conclude their survey of American constitutional development by suggesting that were Benjamin Franklin alive in 1989 his description of the government would be, "[a] republic . . . but you will not be able to keep it."⁸

Beyond the common approach and the shared dismay over the current state of American politics, the authors have markedly different perspectives as they describe the nation's fall over the past two centuries. To be sure, the papers reflect a diversity of expertise. But there is more to the differences than the mere chance of intellectual predisposition. The differences reflect profound, though elusive, disagreement about the proper sphere for governmental activity. As the authors seek to identify the cause or the nature of the change in American society they point to the failing of either institutions or people. These authors thereby manifest a divergence of thought which has existed since the founding. Yet again there is the paradox: if the differences have existed for two centuries, how can it be that consensus on normative issues is ever required?

2. Stevenson, *Is It Time to Reform the Reforms?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 63, 66 (1989).

3. Neuhaus, *The Moral Delegitimation of Law*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 51, 59 (1989).

4. Stevenson, *supra* note 2, at 65.

5. Neuhaus, *supra* note 3, at 55.

6. *Id.* at 59.

7. Berns, *supra* note 1, at 34.

8. McDonald & McDonald, *A Republic, Madam, If You Can Keep It*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 21 (1989).

The McDonalds set the stage by describing two different versions of republicanism which coalesced to form the Constitution. From New England came puritanical republicanism, which "sought moral solutions" and "sought to make better people."⁹ By contrast, the agrarian republicans from the South "believed in making better political arrangements."¹⁰ For the puritanical republicans, religion was a matter of great concern, as the McDonalds evidence with a quotation from John Adams explaining that republican government "could be supported only 'by pure Religion or Austere Morals. Public Virtue cannot exist in a Nation without private [virtue].'"¹¹ The contrasting causal sequence for agrarian republicans began with ownership of land, which produced independence, which produced virtue, which produced republican liberty.¹² What the New England republicans saw as laws designed to make better people (and consequently better government) the Southerners saw as tyranny.¹³

The continuity of the Southern agrarian tradition is manifest in the articles by Stevenson and Berns, both of whom see institutions and laws as the defenders of the virtue of society. "America's Constitution is the product of [a] political science," Berns explains, that "has nothing to say about civic education but, instead, employs new or perfected institutions—the separation or distribution of powers, checks and balances, representation, an independent judiciary—to resolve the persistent political problems, institutions that work only within the extended territory that is the United States."¹⁴ Berns contends that these institutions, and especially the judiciary, have failed to preserve the representative branch as the sole institution where compromise can prevail to prevent conflict over "great causes" from destroying the government.¹⁵ In place of the accommodation inherent in representative bodies, the courts have created a government of rights—rights which, by definition, are not subject to compromise.¹⁶ Stevenson also argues, even confesses, that too great an emphasis has been placed on

9. *Id.* at 9.

10. *Id.*

11. *Id.* at 11.

12. *Id.* at 13; *cf.* Berns, *supra* note 1, at 26-27 on property.

13. Compare McDonald & McDonald, *supra* note 8, at 11, 14.

14. Berns, *supra* note 1, at 26. See also *id.* at 26-27 on mercantilism.

15. *Id.* at 31.

16. *Id.* at 24.

individual rights. But he locates the failure in the representative branch itself.¹⁷ In fact, according to Stevenson, the failure is the result of reforms which made the electoral process too inclusive¹⁸—an echo of the fears of too much democracy which drove the founders to draft the Constitution two centuries ago.

While Berns and Stevenson restate portions of the Southern agrarian tradition, Neuhaus offers a revised interpretation of New England republicanism. He appears to share Berns's (and Stevenson's as well) fondness for a politics of discussion and debate. But Neuhaus differs significantly in the central place he finds for religion in that debate. For Neuhaus, as for the New Englanders of the late eighteenth century, the American constitutional structure cannot succeed "without a radical dependence upon public virtue, and public virtue's radical dependence, in turn, upon religion."¹⁹ In another part of his remarks, he states his thesis in a sequence which reveals the stark contrast between him and the Southern agrarian tradition: "Law is a function of politics; politics, a function of culture; and culture, a function of religion. All are required if we are truly to engage in that exercise which is the asking of one another, and the arguing with one another over, how we ought to order our life together."²⁰ Neuhaus's disagreement with Berns is evident from his critique of contemporary politics where

the ought is dismissed, if not as meaningless, then as capable of being given meaningful answers only in the personal and private sphere, hermetically sealed off to keep from disrupting our public business in a way that might lead to impassioned conflicts over conflicting moralities, and maybe even to religious warfare.²¹

Neuhaus is critical of any version of the American experiment which is premised on an understanding of public virtue which the "state has no business to control or to define."²² By contrast, Berns seems to support the contention that the authority of government "does not extend to the care of souls."²³ Neuhaus calls for a restoration of "pluralism in American life."²⁴ The result of such a restoration is unclear.

17. Stevenson, *supra* note 2, at 69.

18. *Id.* at 66-67.

19. Neuhaus, *supra* note 3, at 55.

20. *Id.* at 60-61.

21. *Id.* at 55.

22. *Id.* at 56.

23. Berns, *supra* note 1, at 28.

24. Neuhaus, *supra* note 3, at 56.

Possibly he would favor "impassioned conflicts over conflicting moralities," but surely not "religious warfare."²⁵

Although the authors reflect the division that separated the members of the founding generation, they lack the shared incentive for agreement on a conclusion. To the extent that they imply that shared religious beliefs is essential, they confront the elusive nature of religion itself. Berns poses the problem in a question: "Who, then, is Nature's God, the god who is said to have endowed us with our rights . . . : the old God or some new god; the Biblical God or the god who reveals himself only in the order of the universe?"²⁶ The religion which Neuhaus says is at the foundation of government is "religion as a functional phenomenon . . . that which is binding in terms of a set of ideas and beliefs in a society, civilization, or tradition."²⁷ Yet religion in that "sociological frame of reference"²⁸ is so broad as to almost certainly lead to what Professor Pangle found Jefferson to anticipate: "the tepid and thoughtless uniformity of unitarianism."²⁹ But Neuhaus anticipates the objection and challenges us to avoid surrendering to clichés. He concedes that the task is difficult but argues that difficulty is no excuse for abdication.³⁰

The recurring effort to identify religious virtue with the "civic virtue" said to be essential to a republican government is clearly fraught with the same difficulties. Pangle points to Montesquieu as saying that "the 'virtue' which sustains a democracy has nothing to do with Christian virtue."³¹ Instead, " 'virtue, in a republic, is the love of one's country, that is, the love of equality. It is not a moral, nor a Christian, but a *political* virtue.' "³² In more nearly contemporaneous phrasing, this virtue is nothing other than following President Kennedy's inaugural challenge: "Ask not what your country can do for you; ask what you can do for your country." The problem thus risks being reduced to a tautology. If civic virtue is required for a society to continue and if virtue is nothing other than a commitment to the society then virtue and society are identical. If

25. *Id.* at 55.

26. Berns, *supra* note 1, at 25.

27. Neuhaus, *supra* note 3, at 52-53.

28. *Id.* at 52.

29. Pangle, *Religion in the Thought of Some of the Leading American Founders*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 37, 45 (1989).

30. Neuhaus, *supra* note 3, at 55.

31. Pangle, *supra* note 29, at 38.

32. *Id.*

individual members have no dedication to the society, there is no society, only atomistic units.

But the contributors do not leave us in such a definitional quagmire. True, they do not agree on answers to the fundamental questions posed by the White Center. But they do point toward an agreement, an implicit consensus, which does seem to be a requisite for the existence of a republic. And, as with so many questions in our national political life, Jefferson saw the answer from the start: "The only genuine truth, or objective validity, religion can evince is its tolerance. . . ." ³³

Thus, one might well conclude from these papers that it is not civic *virtue* upon which the existence of constitutional government depends but civic *dialogue*. The task for the American people and their government is not to ensure the virtue of the citizenry. Instead, the task is to ensure that the public dialogue remains sufficiently civil to enable the compromises which these authors show are essential to the successful evolution of government to meet the different needs of each new generation.

33. *Id.* at 46.